



Making San Francisco Bay Better

May 16, 2013

Steve Fagalde, President
Scott's Jack London Seafood Inc.
255 3rd Street, Suite 102
Oakland, California 94607

AND

Pamela Kershaw, Director of Real Estate
Port of Oakland
530 Water Street
Jack London Square
P.O. Box 2064
Oakland, California 94604-2064

SUBJECT: Violations at Scott's Jack London Seafood Restaurant
(BCDC Permit Nos. 1985.019A, 1985.019B and
Enforcement File No. ER2013.008)

Dear Mr. Fagalde and Ms. Kershaw,

Scott's Jack London Seafood Inc. (Scott's) and the Port of Oakland (the Port) are responsible for at least 37 violations of the McAteer-Petris Act (MPA) and BCDC Permit Nos. 1985.019A (the Port's permit) and 1985.019B (Scott's permit) at and adjacent to the 4,400-square-foot Public Pavilion (the pavilion) located east of Scott's Restaurant located at 2 Broadway in the City of Oakland, Alameda County.

This letter describes the violations, the requirements of the two relevant BCDC permits, the enforcement proceedings to which you may be subject for past and present violations, and the details of each of the violations and the manner in which you may resolve each one using standardized fines.

A. Description of Violations. The Scott's and the Port's violations are generally as follows. A more detailed description can be found in Section F below. The staff has confirmed these violations with multiple site visits, reports from the public and a review of the Scott's and Port's permit files:

1. Construction of an unauthorized metal doorway and storage area in a dedicated public access area in direct contradiction to direction from BCDC staff that this doorway could not be constructed without first obtaining a BCDC permit amendment, the application for which would likely not be supported by the BCDC staff because of the structures' inconsistency with the existing public access

requirements of both the Scott's and Port's permits;

2. Failure to obtain BCDC staff approval of a complete set of design and construction plans, as required by the Scott's permit, prior to replacing the former tent walls with a new retractable wall panel system used to enclose the pavilion for up to 73 days/year, also in direct contradiction to direction from BCDC staff that such prior plan approval was necessary; and
3. Failure to comply with three special conditions of the Scott's permit by not: (a) providing six years of reports of private events; (b) permanently guaranteeing the pavilion as a public access area; and (c) installing and maintaining all of the public access improvements at the pavilion, such as seating, tables and public signage, for at least 292 days/year.

B. Permit Requirements. On March 6, 1986, the Commission issued BCDC Permit No. 1985.019 to the Port of Oakland for development activities along a six-block-long section of the Port's waterfront property between Jefferson and Harrison Streets. On February 13, 1996, Scott's Jack London Seafood Inc. (hereinafter referred to as "Scott's") was added as a permittee as part of Amendment No. Eight to the permit. On July 8, 1997, the Commission split this permit into two separate permits. BCDC Permit 1985.019A covers all of Jack London Square except Scott's Seafood Restaurant and BCDC Permit No. 1985.019B covers only Scott's Seafood Restaurant. BCDC Permit No. 1985.019.010B was issued to both Scott's Jack London Seafood Inc., a tenant of the Port of Oakland, and the Port of Oakland as landowner. Together, these two parties shall herein be referred to as "the permittees."

BCDC Permit No. 1985.019B (hereinafter referred to as "the permit") authorizes the construction, use and maintenance of a 4,400-square-foot pavilion for shared public and private use. Special Condition II-A, "Specific Plans and Plan Review," of the permit requires all authorized and required work and improvements to occur only after receiving BCDC staff approval of the construction documents. Special Condition II-B, "Public Access," of the permit requires the 4,400-square-foot pavilion area to be used for public access, improved with public seating and signage, and dedicated as such through recordation of a legal instrument on title.

Special Condition II-B of the permit allows Scott's Restaurant to use the public pavilion for 73 private events/year by enclosing it with fabric panels. Together, Special Conditions II-A and II-B and Exhibit A to the permit specify the terms of private use.

The permit's findings support the above-outlined special conditions and also state "[t]he proposed pavilion will be situated to provide an unobstructed 34-foot-wide view corridor from Water Street to the estuary 80% of the time, or for 292 days/year, when the facility is open for public use. The existing view corridor width through this plaza is approximately 57 feet wide. The authorized pavilion design will maintain an 18-foot-wide view corridor through the plaza to the shoreline during private events.

C. Appropriate Course of Action and Next Steps. Within 45 days of the date of this letter or by July 1, 2013, the BCDC staff expects you to take the following actions to retain the opportunity to resolve the violations with standardized fines and to avoid the issuance of a cease and desist and civil penalty order, as described in Sections E and F below:

1. Remove the metal entry doorway, storage area and planters from the Commission's jurisdiction and do not re-install them unless and until you have obtained the necessary approval and refrain from violating the Scott's permit;
2. Submit and obtain staff approval of a full set of plans for the retractable wall panel system;
3. Submit six years of reports of private events for the Calendar Years 2008-2013 that meet the requirements of the Scott's permit; and
4. Submit and obtain staff approval of a legal instrument with exhibits to dedicate the public access, install the public tables and chairs and repair the neon sign.

We strongly advise you to submit those items that require staff approval as soon as possible but no later than June 7th to allow time for the BCDC staff to review your submittal and respond in writing and, if necessary, for you to revise the documents and resubmit them for our review.

D. Possible Amendments to the Scott's and the Port's Permits. By letter dated April 16, 2013, you requested permission to legalize the metal entry gate and planters and stated that you would soon be submitting your proposed permit amendments. In an application-filing letter from BCDC, also dated May 16, 2013, we have directed you to submit two applications for each of these structures, in addition to the existing storage area, for the reasons outlined therein. If you remove all of the unauthorized structures, such removal will have resolved these two violations during the time that the Commission considers and acts upon your amendment requests. We recommend this approach.

If you do not remove all of the unauthorized structures, you will remain in violation of the subject permits during the time required for the processing of your amendment requests. As such, you will be subject to administrative civil penalties, to be assessed and collected either through the standardized fine process or through the issuance of a cease and desist and civil penalty order for the entire period that the unauthorized structures remain in place. You will also be charged double permit application fees.

E. Possible Future Enforcement Options. You are subject to one or more of the following enforcement remedies for past and possible future violations.

1. **Executive Director Cease and Desist and Civil Penalty Order.** When the Executive Director determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that may require a permit from the Commission without securing a permit or may be inconsistent with any permit previously issued by the Commission, the Executive Director may issue an order directing that person or governmental agency to cease and desist. We may use this tool if you undertake any further actions that constitute a violation of the law or your

permits. For example, during the construction of the retractable wall panel system and metal entry door in 2013, you closed the pavilion for 73 days. As such, even though you have reached the private use quota for 2013, you continue to hold private events, such as a memorial service observed on April 26, 2013 and the Bay Planning Coalition meeting on May 2, 2013.

2. **Commission Cease and Desist and Civil Penalty Order.** If you have not corrected the alleged violations within 45 days of the date of this letter, or by July 1, 2013, you may, pursuant to section 11386(h) of the Commission's regulations, no longer have the option to settle this matter with standardized fines and we may commence a formal enforcement proceeding that could lead to the issuance of a cease and desist and civil penalty order with an administratively imposed civil penalty of between \$10 and \$2,000 per day up to a maximum of \$30,000 per alleged violation. Also, you have failed to comply with the following BCDC permit requirements: (a) Special Condition II-B of the Scott's permit by privatizing the pavilion between 4 and 27 times more than the allowed 73 times/year based on the available data for the Calendar Years 1999-2007 and not using the pavilion in the manner required by the permit; and (b) Special Condition II-B of the Port's permit by privatizing the Franklin Street Plaza at least two times in 2012. You cannot resolve past violations of this nature and may be retroactively fined for these violations with a Commission-issued civil penalty order.
3. **Permit Revocation:** The Commission's regulations provide that the Commission may partially or completely revoke a permit for the violation of a term or condition of permit, the violation of a Commission or Executive Director cease and desist order, or the inclusion of inaccurate information in a permit application or at the public hearing on a permit application (Section 11301). The staff may recommend to the Commission that it should revoke your permission to privately use the pavilion for past and future possible violations of the Scott's permit.
4. **Standardized Fines.** Pursuant to section 11386 of the Commission's administrative regulations (the regulations), you may be subject to administrative penalties for the violations described herein (the violations) (Cal. Code of Regulations (CCR), Title 14, Division 5, a copy of which is enclosed herewith.) Pursuant to section 11386(b)(2) of the regulations, you have a 35-day grace period from the date of this letter to resolve the violations cited in Section F below wherein no civil penalties apply. Following this grace period, penalties commence and standardized fines begin accruing. Upon resolution of all of the violations, you may resolve the penalty portion of the violations by paying the standardized fines or, pursuant to section 11386(k) of the regulations, seek resolution through a formal enforcement proceeding that would involve a public hearing. This letter commences the standardized fine process, outlined in detail in Section F below.
5. **Court Imposed Penalties.** The law (MPA § 66641.5(a)-(d)) provides that the Commission may seek significant court imposed penalties for the above-described violations, among other legal remedies.

F. Description of Each Violation and Associated Standardized Fines

- 1.a - 1.d Four Unauthorized Structures:** 1.a. **Metal-framed entry doorway;** 1.b. **Storage area and stage;** 1.c. **Wood and metal-framed wall;** and 1.d. **Multiple planters.** These violations involve the failure to comply with the requirements of the McAteer-Petris Act by undertaking the construction of a metal-framed entry doorway, storage area and stage, wood and metal-framed wall, and installation of multiple planters in and adjacent to the pavilion without first obtaining the necessary authorization. You may resolve each of these four violations either by removing these unauthorized structures from the Commission's jurisdiction or by obtaining the necessary authorization, which the staff has advised you would take the form of two material permit amendments to both the Scott's and the Port's permits, based on the proposed location of the structure.

Standardized Fines for Violations 1.a-1.d (14 CCR § 11386(e)(4)). The most certain way to reduce your potential administrative civil liability is to remove all of the unauthorized structures until you have obtained the necessary Commission approval.

If one or more fileable applications is submitted between 36 and 65 days and one or more permit amendments is obtained within 155 days after the date of the mailing of this letter or the unauthorized activities are completely corrected between 36 and 65 days, you may resolve the penalty portion of the alleged violations by paying a standardized fine of \$2,000 per violation. If one or more fileable applications is submitted between 66 and 95 days and one or more permit amendments is obtained within 185 days after the date of the mailing of this letter or the unauthorized activities are completely corrected between 66 and 95 days, you may resolve the penalty portion of the alleged violations by paying a standardized fine of \$5,000 per violation. If one or more fileable applications is submitted or the unauthorized activities are completely corrected more than 95 days after the date of the mailing of this letter, you may resolve the penalty portion of the alleged violations by paying a standardized fine of \$5,000 plus \$100 per day per violation from the 96th day to the date one or more permit amendments is obtained or the unauthorized activities are completely corrected.

- 2. Retractable Wall Panel System.** This violation involves the failure to comply with the requirements of Special Condition II-A, Specific Plans and Plan Review, of the Scott's permit by undertaking the unauthorized construction of a retractable wall panel system prior to obtaining staff approval of design and construction plans. You may resolve this violation by obtaining BCDC staff approval of plans for it and making any modifications to the as-built structure if it is not consistent with the BCDC-approved plans.

Standardized Fines for Violation 2 (14 CCR § 11386(e)(3)). If plans for the retractable wall panel system are submitted to and approved by staff pursuant to Special Condition II-A and any required modifications made between 36 and 65 days after the date of the mailing of this letter, you may resolve the penalty portion of the alleged violation by paying a standardized fine of \$1,000. If plans for the retractable wall panel system are submitted to and approved by staff pursuant to Special Condition II-A and any required modifications made between 66 and 95 days after the date of the mailing of this letter, you may resolve the penalty portion of the

alleged violation by paying a standardized fine of \$3,000. If plans for the retractable wall panel system are submitted to and approved by staff pursuant to Special Condition II-A and any required modifications made more than 95 days after the date of the mailing of this letter, you may resolve the penalty portion of the alleged violation by paying a standardized fine of \$3,000 plus \$100 per day from the 96th day to the date the plans for the retractable wall panel system are approved by the staff pursuant to Special Condition II-A and the required modifications are made pursuant to the approved plans.

3. **Event Schedule Reporting.** This violation involves the failure to comply with the requirements of Special Condition II-B-2-c including Exhibit A of the Scott's permit by not submitting the quarterly schedules of private events to be held in the Public Pavilion during 2008 through 2013. In addition, you failed to submit an annual summary of events for these same six years. You may resolve these reporting violations by submitting each missing document. We calculate that you must submit 30 quarterly schedules of events and six annual summaries.¹
4. **Permanent Guarantee.** This violation involves the failure to comply with the requirement of Special Condition II-B-3 to permanently dedicate the required public access area. You may resolve this violation by obtaining staff approval of a CC&R document. Enclosed are instructions and a form, both also available on our website.

Standardized Fines for Violations 3 and 4 (14 CCR § 11386(e)(2)). For each document submitted to and approved by staff between 36 and 65 days after the date of the mailing of this letter, you may resolve the penalty portion of the alleged violation by paying a standardized fine of \$1,000 per document. For each document submitted to and approved by staff between 66 and 95 days after the date of the mailing of this letter, you may resolve the penalty portion of the alleged violation by paying a standardized fine of \$3,000 per document. For each document submitted to and approved by staff more than 95 days after the date of the mailing of this letter, you may resolve the penalty portion of the alleged violation by paying a standardized fine of \$3,000 per document plus \$100 per day for each document, from the 96th day to the date each document is received by the staff.

5. **Improvements Within the Public Access Area.** This violation involves the failure to comply with the requirements of Special Condition II-B-5, including Exhibit B, of the Scott's permit by not providing all required public access improvements, such as a working neon sign atop the pavilion, public tables and seating (consisting of 15 tables with four seats each and five tables with two seats each) and public signage. You may resolve this violation by repairing the neon sign, installing the public seating and tables for at least 282 days/year and installing temporary signs when the pavilion is in legal private use.

¹ As noted in Section E.2 of this letter, if the reports or any other available evidence disclose that you used the pavilion more than 73 days in any calendar year and/or in any other manner inconsistent with the requirements of Special Condition II-B of the Scott's permit, we may pursue monetary penalties for these violations with a Commission-issued civil penalty order.

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Standardized Fines for Violation 5 (14 CCR § 11386(e)(3)). If you install all of the public access improvements required by Special Condition II-B-5 and pursuant to staff approved plans between 36 and 65 days after the date of the mailing of this letter, you may resolve the penalty portion of the alleged violation by paying a standardized fine of \$1,000. If you install all of the public access improvements required by Special Condition II-B-5 and pursuant to staff approved plans between 66 and 95 days after the date of the mailing of this letter, you may resolve the penalty portion of the alleged violation by paying a standardized fine of \$3,000. If you install all of the public access improvements required by Special Condition II-B-5 and pursuant to staff approved plans more than 95 days after the date of the mailing of this letter, you may resolve the penalty portion of the alleged violation by paying a standardized fine of \$3,000 plus \$100 per day from the 96th day to the date all of the required public access improvements are installed pursuant to staff approved plans.

G. Pending Submittals. We have received and will respond within the next two weeks to the plans for: (1) the retractable wall panel system (and the amendment request for the unauthorized structures); and (2) the 2012 Events Report, received on April 17 and 22, 2013, respectively.

Executive Director Larry Goldzband is looking forward to conducting a site visit at the pavilion next week to visually confirm the violations as described in this letter and to learn of your compliance plans. You are certainly welcome to join him at that time.

If you have any questions about any of the above, please contact me at 415-352-3609 or by email at adriennek@bcdca.gov.

Sincerely,



ADRIENNE KLEIN
Chief of Enforcement

AK/ms

Enc.

cc: Steve Hanson, consultant to Scott's Restaurant
Caroline Morris, Ellis Partners LLC